

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRIAN KVORJAK,)	
)	
Plaintiff)	
)	
v.)	Civil No. 99-CV-00149-B
)	
STATE OF MAINE,)	
)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Brian Kvorjak, alleges that Defendant, State of Maine, violated Title I and II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117 and 42 U.S.C. §§ 12131-12134, the Rehabilitation Act of 1973, 29 U.S.C. §§ 706(8) and 794(a), and the Maine Human Rights Act (MHRA), 5 M.R.S.A. §§ 4551-4633, by failing to provide the reasonable accommodation of permitting Plaintiff to work at home. Presently referred to me for recommended decision is Defendant's Motion for Summary Judgment in which Defendant asserts several reasons why Plaintiff's claim fails as a matter of law. For reasons explained below, I recommend that the Court GRANT Defendant's Motion.

Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*,

990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

Facts

In 1954 Plaintiff was born with spina bifida, a condition in which the neural tube or neural canal fails to properly form during gestation. Plaintiff's Revised Statement of Material Facts (PRSMF) ¶ 2. As a result, Plaintiff is partially paralyzed in the lower extremities. *Id.* At times simple tasks such as sitting, standing, or laying down causes Plaintiff pain. *Id.* Spina bifida also hindered the development of Plaintiff's legs and ankles. As a result, Plaintiff cannot walk more than ten to twelve feet without using a cane. *Id.* ¶ 3. Further, Plaintiff's condition causes him problems with his bowels and bladder. *Id.* ¶ 4.

Prior to his termination in 1997, Plaintiff worked for various state agencies for twenty-two years. Defendant's Statement of Material Facts (DSMF) ¶ 2. During the last seven years of employment Plaintiff worked at a field office in Rockland, Maine as a

claims adjudicator for the Department of Labor's Division of Unemployment Field Services (the Division). *Id.* ¶ 3.

In the mid-1990s the Division decided to cut expenses and close fifteen field offices, including the Rockland office, and shift services to three call centers in Presque Isle, Bangor and Lewiston. *Laura Boyett Aff.* ¶ 7; DSMF ¶5. To assist with the transfer the Division sent out employee surveys asking the employee if he or she would consider relocating to a call center. In both surveys, Plaintiff indicated that he would be able to work in a call center and listed Bangor as his primary choice. DSMF ¶ 6-7.

Before the transfer in 1997, Plaintiff drove the one and a half hour commute from his home in Owl's Head, Maine to Bangor, Maine for two days in a row. PRSMF ¶ 5. At that time he realized he could not commute that distance everyday and applied for a disability pension. *Id.* Plaintiff asked that he be permitted to use his accumulated sick time until his pension request was processed. The State denied his request and Plaintiff contacted the Disability Rights Center (the Center). *Id.* ¶ 6.

The Center suggested to Plaintiff that he request the accommodation of working at home. On May 13, 1997, Plaintiff wrote a letter to Laura Boyett, the Director of the Division of Unemployment Field Services, stating that he could not commute or relocate to Bangor due to his physical condition. *Id.* ¶ 8. On May 21, 1997, Plaintiff sent a written request that he be able to perform his job at home. *Id.* ¶9. That next month Plaintiff provided the Division with a letter from his physician stating that the commute to Bangor everyday would have a detrimental impact on Plaintiff's health, and asked that he be provided the accommodation of working at home. *Id.* ¶10.

The Division rejected Plaintiff's request to work at home because Plaintiff could not perform the essential functions of his position at home. *Id.* ¶ 11. However the Division did offer Plaintiff the accommodation of paying for any temporary housing in the Bangor area until Plaintiff found a home and paying for support services Plaintiff may need once in the Bangor area. *Id.* ¶ 12. One of Plaintiff's doctors, Dr. Stephen Bamberger, M.D., indicated that Plaintiff can commute up to ten minutes one way and that there was no medical reason Plaintiff could not work in the Bangor area. *Id.* ¶ 13.

The Division does not permit any employees to work at home. DSMF ¶ 57. The Department of Labor does permit two employees to work at home. Those employees had an allergic-type reaction to substances in their office building. *Id.* ¶ 58. Both employees are working at home on a temporary basis while the Department constructs a "clean-room" at the workplace. *Id.* ¶ 59. Both employees are not claims adjudicators. One employee is a clerk who organizes files and the other is a tax specialist whose primary duty is to call employers who owe unemployment taxes. *Id.* ¶ 60. The essential functions of their jobs are different than that of a claims adjudicator. *Id.*

Before Plaintiff's termination, he called Susan Bell, a Department of Labor Personnel Specialist, to ask that he be paid accumulated sick-time benefits. Susan Bell told Plaintiff that upon termination he could no longer claim accrued sick-time benefits and sent Plaintiff a copy of the Maine Civil Service Rules that reads, "all sick leave shall expire on the date of separation from state service, and no employee shall be reimbursed for sick leave outstanding at the time of termination of his state employment." DSMF ¶¶ 65-67.

Analysis

Plaintiff contends that Defendant discriminated against him on the basis of his disability in violation of the ADA, the Rehabilitation Act and the MHRA.¹ To obtain relief under the ADA, a plaintiff must demonstrate:

First, that he was disabled within the meaning of the Act. Second, that with or without reasonable accommodations he was able to perform the essential functions of his job. And third, that the employer discharged him in whole or in part because of his disability.

Katz v. City Metal Co., 87 F.3d 26, 30 (1st Cir. 1996).

Here, Defendant concedes that Plaintiff is disabled within the meaning of the ADA. Defendant's Reply to Statement of Additional Facts Submitted by Plaintiff ¶ 1. In dispute is whether Plaintiff is a qualified individual with a disability. The statute defines a "qualified individual with a disability" as an:

individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8). To determine whether an individual is a "qualified individual with a disability" the Court must examine (1) whether Plaintiff can perform the essential functions of the job and, if Plaintiff cannot perform the essential functions of the job, (2) whether reasonable accommodations made by his employer that would enable him to perform those essential functions. *Turner v. Jack Rabbit, Inc.*, 12 F. Supp. 2d 529, 531 (E.D Va. 1998) (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n. 17.

¹ A claim under the MHRA mirrors the analysis given to the claim under the ADA. *See Abbott v. Bragdon*, 107 F.3d 934, 938 (1st Cir 1997) (The Maine Supreme Court has indicated that analogous federal law informs the interpretation of the MHRA) (citations omitted). Likewise, interpretation of Rehabilitation Act parallels the ADA. *See Holbrook v. City of Alpharette*, 911 F. Supp. 1524, 1536 n.12 (N.D. Ga. 1995) ("The standards used to determine whether [the Rehabilitation Act] has been violated in a complaint alleging employment discrimination . . . [are] the standards applied under Title I of the Americans with Disabilities Act of 1990 . . .").

(1987)). The ADA does not require an employer to provide an accommodation if that accommodation imposes an undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A).

Here, Defendant makes three primary arguments why Plaintiff has failed to state a claim as a matter of law. First, Defendant maintains that Plaintiff cannot perform the essential functions of the position if it provided him the one accommodation Plaintiff seeks, namely, working at home. Second, Defendant maintains that working at home is not a reasonable accommodation. Third, Defendant argues that even if the Court determines that Plaintiff can perform those essential functions of the position when provided the reasonable accommodation of working at home, that accommodation would impose an undue hardship on the Defendant. Because I conclude that Plaintiff cannot perform the essential functions of the position if provided the accommodation of working at home, I need not address Defendant's other arguments.

A. Essential Functions of a Claims Adjudicator

The ADA does not provide a specific definition of what the "essential functions" of a position are. Instead it points out that:

For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer had prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8). The regulations expand upon the statute stating that the "essential functions" are those "fundamental job duties" of the position, 29 CFR § 1630.2 (n)(1), and lists areas that one may consider as evidence that a function is essential. Those areas include the employer's judgment that the functions are essential, the written job

description created before advertising or interviewing for the position, the amount of time spent performing the function, the consequence of not requiring the employee to perform the function, the terms of the collective bargaining agreement, the work experience of past employees in the position, and the current work experience of employees performing the job. *Id.* § 1630.2 (n)(3). Plaintiff has the burden to provide specific competent evidence that he could perform the essential functions of the position. *Soto-Ocasio v. Federal Express Corp.*, 150 F.3d 14, 18 (1st Cir. 1998).

Defendant argues that it is entitled to summary judgment because Plaintiff cannot perform the essential functions of the position even if he was provided the only accommodation requested – to work at home. *See Connors v. Maine Medical Center*, 42 F. Supp.2d 34, 40 (D. Me 1999) (plaintiff is a “qualified individual with a disability” under the ADA only if, when provided the requested reasonable accommodation, the plaintiff can perform the essential functions of the position). Here, Defendant put forward the affidavit of Laura Boyett, supervisor of all claims adjudicators, and a task statement created by the Division. The task statement is used by the Division to describe the job duties of claims adjudicators to persons interviewing for the position. Boyett Aff. ¶ 21. The task statement contains many, but not all of the tasks that a claims adjudicator must perform. *Id.* In her affidavit, Boyett delineates additional functions not listed in the task statement. *Id.* ¶¶ 22-48.

In its Statement of Material Facts Defendant lists those functions either contained within the Task Statement or the body of the Boyett affidavit that Defendant considers essential to the claims adjudicator position that cannot be performed in the home. Defendant claims that claims adjudicators must perform the following essential functions:

1. Explain the unemployment insurance system to the public and resolve problems surrounding the claims process. Defendant claims that this function cannot be performed at home because it requires the claims adjudicator to examine papers filed in the call center and access additional information on the computer. DSMF ¶¶ 22, 41.
2. Serve as "Adjudicator of the Day" by answering questions from the public and assisting employees with questions when problems arise. Claims adjudicators serve as the "Adjudicator of the Day" once every five to seven days. Defendant claims that because an Adjudicator of the Day must deal with problems that arise during the day and answer questions from the public, this function cannot be performed at home. DSMF ¶¶ 23, 34.
3. Determine whether a person is entitled to unemployment insurance benefits. Defendant claims that this function cannot be performed at home because the claims adjudicator must review documents that are placed in the office and information placed in the computer. DSMF ¶¶ 24, 41.
4. Assist claims specialists or employment security aides with any questions they may have during the day. This function requires the claims adjudicator to be present in the office. On this point Plaintiff concedes that if he worked at home employees would probably not use him as a resource. DSMF ¶¶ 25, 36.
5. Participate personally with training lower-level employees. This cannot be done by a claims adjudicator that works at home. DSMF ¶¶ 26, 35.
6. Serve on "Rapid Response Teams" that are sent to work places where a large number of employees are about to be laid off. Claims adjudicators explain to employees the unemployment insurance system. To perform this function an adjudicator must travel up to two hours each way. DSMF ¶¶ 27, 37.
7. Conduct fraud investigations by interviewing the person or persons suspected of fraud. These interviews must be conducted in-person and Defendant claims that it would be dangerous and expose itself to potential liability if it instructed persons to go to Plaintiff's house in Owl's Head. DSMF ¶¶ 28, 40.
8. Attend hearings when a claimant or employer appeals a claims adjudicator's decision. DSMF ¶ 29.
9. Fill in for absent supervisors, which an at-home claims adjudicator cannot do. DSMF ¶¶ 30, 39.
10. Assist lower-level employees answer telephone calls which cannot be done by an at-home claims adjudicator. DSMF ¶ 31.

In his response to this list of essential functions, Plaintiff only specifically responds to two – that fraud investigations are done by specialized units, not by someone in Plaintiff's position, and that Plaintiff may be able to attend hearings in person. PRSMF ¶¶ 38, 40. That is sufficient to place those two facts in dispute, however, that leaves eight other functions in which Plaintiff either denies or qualifies Defendant's assertion by offering the following:

Certain functions of the job could be stripped away so that [Plaintiff] could work at home. Thayer Dep. 31. What the essential functions of a job are is a question of fact. 29 C.F.R. 1630.2(n).

Plaintiff fails to assert any specific facts that those functions listed by Defendant are not essential, or that he could perform those functions at home.² For example, Plaintiff fails to offer any fact to dispute Defendant's assertions that serving on a Rapid Response Team, serving as an Adjudicator for the day, or training other employees are essential functions of the claims adjudicator position. Plaintiff's suggestion that certain functions could be stripped away to accommodate his request to work at home is not required when those functions are essential. *See Feliciano v. Rhode Island*, 160 F.3d 780, 785 (1st Cir. 1998) ("The ADA does not require an employer to accommodate a disability by foregoing an essential function of the position or by reallocating essential functions to make other jobs more onerous.").

In his brief Plaintiff makes three arguments that, he contends, raise a question of material fact regarding the essential functions of the job. Plaintiff points to the testimony of Kathleen Dunford, the Department of Labor's Personnel Manager, that not every task

² For instance, Plaintiff could have presented a question of fact if he countered Boyett's affidavit by presenting evidence that the functions listed by her were not listed previously even when requested during discovery, or presented evidence that, for example, the Division has used Rapid Response Teams once in the last year. Plaintiff's assertion that the essential functions of a job is a question of fact is a conclusory assertion and lacks the specificity needed to survive this motion.

listed on the Task Statement was performed by the claims adjudicator. PRSMF ¶ 20; Dunford Dep. 72. However, the document Dunford was referring to during her deposition was not the task statement identified in the Boyett affidavit, but a list of general duties a claims adjudicator may have to perform at a call center. *Id.* 70-71; Dunford Exhibits 9, 11. Dunford offered no testimony to suggest that the tasks on the Task Statement produced by the Division were not essential functions.

Plaintiff next points to the testimony of Gail Thayer, the Director of the Bureau of Unemployment Compensation, that if the law required it, the Division could strip certain functions of the position away to accommodate Plaintiff working at home. Thayer Dep. 30-32. However, Thayer continued to testify that some of the duties designated by Ms. Boyett as essential would have to be stripped away to permit Plaintiff to work at home. Thayer Dep. 36-37, 39, 42.³ As stated above, that ADA does not require essential functions of the position to be stripped away to accommodate an employee. *Feliciano*, 160 F.3d at 785.

Plaintiff's last argument is that his position is similar to that of a hearing officer. Plaintiff makes this comparison based only on his description of his job when he worked at the field office in Rockland and his understanding of the tasks performed by hearing officers. Kvorjak Dep. 25, 60. There are two flaws in this argument. First, when the Division transferred its operations from field offices to call centers, the duties needed to be performed by claims adjudicators increased. Therefore, Plaintiff's description of tasks

³ Plaintiff points out that, unlike Boyett, Thayer refused to testify that the functions listed in the task statement were essential, instead characterizing them as important. Thayer Dep. 36, 39. I place little significance in this because it is clear to me that while characterizing those functions as important, she was not refusing to characterize them as essential. However, even if I accept Plaintiff's characterization of Thayer's testimony, he does not provide specific facts to dispute several of the functions that Boyett lists as essential in her affidavit. Boyett Aff. ¶¶ 22-48. For example, Plaintiff offers no specific facts that dispute Boyett's assertion that serving on the Rapid Response Team or as an Adjudicator for the day are essential functions.

he performed as a claims adjudicator at the field office is no longer applicable. Second, even if a comparison between the two positions were plausible, it is undisputed that hearing officers and claims adjudicators do not perform the same functions. For example, hearing officers do not perform team work, access confidential information via computer that adjudicators must access, or need to be connected to a call center to assist adjudicators, staff employees, and the public with questions. Thayer Aff. ¶ 24. Further, even though, as Plaintiff contends, hearing officers work at home, they do so at most once a week, not everyday.⁴ *Id.* ¶ 25

Having found that Plaintiff cannot perform the essential functions of the claims adjudicator position at his home I will not address whether working at home is a reasonable accommodation, or whether permitting Plaintiff to work at home would cause an undue burden on Defendant.

B. Plaintiff's Claim under Title II of the ADA

Plaintiff claims that Defendant violated Title II of the ADA by not permitting him to use accrued sick benefits. Plaintiff argues that Defendant should have permitted him to use those benefits until he exhausted them. As Defendant properly points out, Plaintiff improperly characterizes this claim under Title II of the ADA, which "prohibits qualified individuals with disabilities from being excluded from participation in or the benefits of the services, programs, or activities *of a public entity*." *Randolph v. Rogers*, 170 F.3d 850, 857 (8th Cir.1999) (*italics added*). Title II, therefore, requires that government

⁴ Plaintiff's states that at one time the DOL had an "overflow" office where claims adjudicators wrote decisions for backlogged cases. Plaintiff speculates that it seems as if that is the type of job function he could perform at home. However, Plaintiff has put no fact into the record to dispute Defendant's assertion that the DOL no longer maintains an overflow office. Thayer Dep. 50.

Plaintiff also argues that it seems there are enough claims adjudicators to transfer certain tasks to him and have certain other tasks transferred to other adjudicators so that he could work at home. However, the ADA does not require an employer to transfer essential functions of the position to other employees. *Feliciano v. State of Rhode Island*, 160 F.3d 780, 785 (1st Cir. 1998).

services be provided on a non-discriminatory basis, but does not cover employment benefits, which are more appropriately asserted under Title I. *Carpent's Distribution Center, Inc. v. Automotive Wholesaler Assoc. of New England, Inc.*, 37 F.3d 12, 16 (1st Cir. 1994) (seeking employment benefits under Title I of the ADA); *Andrews v. United Way of South Alabama, Inc.*, No. CIV. A. 98-1142-P-C, 2000 WL 210694 at * 5 (S.D. AL. Jan. 26, 2000) (seeking employment benefits under Title I of the ADA).

Analyzing Plaintiff's claim for sick-time benefits under Title I it is clear that the claim cannot withstand scrutiny. Plaintiff has failed to place any material fact in dispute that Defendant merely followed their civil service rules for employees who have accrued sick leave at the time of their termination.

Conclusion

For the reasons explained above I recommend that the Court GRANT Defendant's Motion for Summary Judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: August 23, 2000

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-149

KVORJAK, et al v. MAINE, STATE OF, et al

Filed:

06/10/99

Assigned to: Judge GEORGE Z. SINGAL

Jury demand: Plaintiff

Demand: \$0,000

Nature of Suit: 442

Lead Docket: None

Jurisdiction: Federal

Question

Dkt# in other court: None

Cause: 42:12101 American Disabilities Act

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